91-478

No.

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

SHINCHOSHA COMPANY,
Petitioner,
VS.
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
and
SHIGETO SHIMIZU,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Does a Japanese language publisher, located in Japan, and serving the Japanese market, which has no assets and conducts no business activity in California or elsewhere in the United States, have the requisite minimum contacts with the State of California to permit a California court to assert personal jurisdiction, where 40 copies of its Japanese language magazine that is the subject of the action were distributed in California by independent distributors?

2. Does the sale of magazines to independent distributors, where the company retains no control over or possessory interest in those copies, constitute placement of the magazine into the stream of commerce?

3. Is placement of magazines into the stream of commerce through their sale in Japan to independent distributors sufficient, without other action by the publisher and without regard to the number of copies delivered, to permit any state in which the independent distributor chooses to deliver the magazines to assert personal jurisdiction over the foreign publisher?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Court of Appeal of the State of California, Second Appellate District, are named in the caption.

TABLE OF CONTENTS

	Page(s)
Questions Presented	i
Parties to the Proceeding	i
Table of Authorities Cited	iii
Opinions Below	1
Jurisdiction	2
Statutes and Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	7
I.	
Basing Jurisdiction Solely on a Defendant's Awareness that its Products Reach the Forum State Through the "Stream of Commerce" Violates Due Process	7
II.	
Jurisdiction Over an Alien Publisher for Defamation is Unreasonable When Distribution of the Allegedly Defamatory Publication in the Forum State is Minimal	12
III.	
The Unresolved Issues in *Asahi* and *Keeton* Create Confusion Among Courts in Judging Whether "Minimum Contacts" Exist	15
Conclusion	17

TABLE OF AUTHORITIES

Cases

Page(s)

Akbar v. New York Magazine, 490 F. Supp. 60 (D.D.C. 1980) 14

Army Times Publishing Co. v. Watts, 730 F.2d 1393 (11th Cir. 1984) 14

Asahi Metal Industries v. Superior Court of California, Solano City, 480 U.S. 102 (1987) 7, 8, 9, 10, 11, 15, 16

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 10

Calder v. Jones, 465 U.S. 783 (1983) 13

Church of Scientology of California v. Adams, 584 F.2d 893 (9th Cir. 1978) 14

Evangelize China Fellowship, Inc. v. Evangelize China Fellowship, Hong Kong, 146 Cal. App. 3d 440, 194 Cal. Rptr. 240 (1983) 13

Hall v. Zambelli, 669 F. Supp. 753 (S.D. W. Va. 1987) 15

In re San Juan Dupont Plaza Hotel Fire Lit., 742 F. Supp. 717 (D. Puerto Rico 1990) 15

Irving v. Owens-Corning Fiberglass Corp., 864 F.2d 383 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 83 (1989) 15

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) 12, 13, 15, 16

Lockman Foundation v. Evangelical Alliance Mission, et al., 930 F.2d 764 (9th Cir. 1991) 11

McGee v. International Life Insurance Co., 355 U.S. 220 (1957) 10

Morris v. SSE, Inc., 843 F.2d 489 (11th Cir. 1988) .. 15

TABLE OF AUTHORITIES

CASES

	Page(s)
M/S BREMEN, et al. v. Zapata Off-Shore Co., 407 U.S. 1 (1972)	11
Samad v. High Society Magazine, 10 Med. L. Rptr. 1930 (D.V.I. 1984)	14
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)	11
Sipple v. Des Moines Register & Tribune Co., 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978)	14
Smith v. Dainichi Kinzoku Kogyo Co., 680 F. Supp. 847 (W.D. Tex. 1988)	15
Sturgill v. Chema Nord Delekkemi Nobel Indus., 687 F. Supp. 351 (S.D. Ohio 1988)	16
Tomashevsky v. Komori Printing Machinery Co., Ltd., 715 F. Supp. 1562 (S.D. Fla. 1989)	15

U.S. Constitution

Fourteenth Amendment, Due Process Clause	2

Statutes and Rules

California Code of Civil Procedure section 410.10	2
22 C.F.R. § 41.52(b)(2)	2, 3
28 U.S.C. section 1257 (1966)	2

Other Authorities

1 C. Gordon & S. Mailman, *Immigration & Procedure*, § 12.03[1][c], § 17.08	3
Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and Revised Approach*, 77 Ky. L. J. 243 (1989)	16

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Petitioner prays that a writ of certiorari issue to review the final order of the Court of Appeal of the State of California, Second Appellate District, entered in this case on May 16, 1991.

OPINIONS BELOW

The decision of the Superior Court of the State of California, County of Los Angeles, is reproduced in Appendix A, *infra*. The decision of the Court of Appeal is reproduced in Appendix B, *infra*. The decision of the California Supreme Court is reproduced in Appendix C, *infra*.

JURISDICTION

By a final order of May 16, 1991 entered the same date, the Court of Appeal of the State of California, Second Appellate District, denied Petitioner's Petition for Writ of Mandate. On June 20, 1991, the Supreme Court of California denied Petitioner's Petition for Review. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

California Code of Civil Procedure section 410.10 states:

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

The provision of the United States Constitution involved is the Due Process Clause of the Fourteenth Amendment:

Section 1 . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

(1) Factual Background

This is a libel case brought by a Japanese citizen temporarily residing in Los Angeles[1] (Mr. Shimizu)

[1] Mr. Shimizu is residing in the United States pursuant to a nonimmigrant treaty investor visa. Although such visa holders "need not show that they are coming to the United States for a specific, limited period of time," they still must establish that they intend to leave the United States when their visas expire. 22 C.F.R. § 41.51

against the Japanese editor (Mr. Goto) of a Japanese magazine (*Focus*) and the magazine's Japanese publisher (Shinchosha).

The allegedly defamatory article, which was written and researched in Japan, and which dealt primarily with Mr. Shimizu's investments on the Osaka (Japan) Stock Exchange, appeared in the May 26, 1989 issue of *Focus* magazine. Approximately 600,000 copies of *Focus* are published each week by Shinchosha in Japan, in Japanese, for a Japanese readership. Almost all of the 600,000 weekly copies of *Focus* are distributed and purchased in Japan. Other than a small number of issues which Shinchosha sends directly to subscribers (most of whom are in Japan and none of whom are in California), distribution of *Focus* occurs through sixteen Japanese distribution companies that are entirely independent of Shinchosha. Approximately forty (40) copies of *Focus*, or less than 1/100 of one percent, are sent to California by three of those independent companies.[2] With regard to those issues of *Focus* that are distributed in Japan, Shinchosha has an agreement that the distributors may return unsold copies, but with respect to those issues that are sent abroad, Shinchosha does not permit any returns. Thus, Shinchosha retains no possessory or consignment interest of any kind in those forty (40) copies of *Focus*, or in any other Shinchosha publication distributed outside of Japan.

Shinchosha has no meaningful contacts with California, or, for that matter, with any state in the United States.

(b)(2); 1 C. Gordon & S. Mailman, *Immigration Law & Procedure* § 12.03[1][c] at 12-17, § 17.08 at 17-46.

[2] There is no evidence in the record that prior to this lawsuit either Shinchosha or the editor of *Focus*, Mr. Goto, had any awareness that those independent companies sent any copies of *Focus* to California.

Shinchosha is the oldest major publishing house in Japan. The company was established in 1896 for the purpose of publishing serious works of literature. Shinchosha has been located in Tokyo, Japan since its founding. The company has no other offices or subsidiaries and all of its publishing activity occurs in Tokyo. Shinchosha owns no property in California, has no offices or employees in California, derives no income from California, and has never filed income tax returns or paid income taxes to the State of California. For that matter, Shinchosha has no employees or offices anywhere in the United States, and it has never filed income tax returns or paid income taxes in the United States.

Focus magazine is a department of Shinchosha and has no legal existence apart from Shinchosha. *Focus* publishes articles concerning politics, economics, the arts and matters of general social interest. Like all works published by Shinchosha, *Focus* is published in the Japanese language, and is intended exclusively for Japanese readership.

Focus decided to research, and ultimately to publish, an article regarding Mr. Shimizu after *Focus* received, unsolicited — from a free-lance photographer in Los Angeles who is neither an employee nor an agent nor a representative of Shinchosha — photographs of Mr. Shimizu and a copy of an article regarding Mr. Shimizu that had been published in a Los Angeles-based Japanese language newspaper. Apart from the unsolicited photographs and information, all of the research and writing regarding the article in question occurred in Japan. No employee of Shinchosha travelled to California, or otherwise outside of Japan, in conjunction with the preparation or publication of the article.

The May 1989 *Focus* article that is the subject of this lawsuit dealt primarily with investments Mr. Shimizu

made on the Osaka (Japan) Stock Exchange in 1985. In connection with that story, the article mentioned certain of Mr. Shimizu's activities related to California. Of the sixteen (16) allegedly "defamatory" statements contained in the article, twelve (12) have no relationship to California.

(2) Procedural Background

Despite the defendants' complete lack of meaningful contacts with California, the Los Angeles Superior Court determined on April 16, 1991, that Mr. Goto and Shinchosha were present for all purposes in California, and subject to the general jurisdiction of California courts (the Superior Court's minute order is attached as Exhibit A). The court found that jurisdiction over the "defendant" was appropriate "by virtue of . . . it's published products being sold in California."[3]

On May 3, 1991, Mr. Goto and Shinchosha submitted a petition for a writ of mandate to the Court of Appeal directing the Superior Court to quash the service of summons. The Court of Appeal issued a summary denial of that petition on May 16, 1991. (Attached as Exhibit B). On May 24, 1991, Shinchosha and Mr. Goto submitted a petition to the California Supreme Court for review of the Superior Court's denial of the motion to quash, and of the Court of Appeal's summary denial of the petition for writ of mandate. The California Supreme Court issued an

[3] Although not explicitly stated, the Superior Court appeared to base jurisdiction, in part, on the presence in California of Shinchosha publications other than *Focus* magazine. Any such publications are not only unrelated to Mr. Shimizu's cause of action, but they also constitute a small fraction of Shinchosha's total publications and, like *Focus* magazine, arrive in California solely through the independent actions of distribution companies unrelated to Shinchosha.

order on June 20, 1991 denying the petition for review and request for stay as to Shinchosha, but granting the petition and request for stay as to Mr. Goto.[4] (Attached as Exhibit C). The Court further ordered that review as to Mr. Goto be transferred to the Court of Appeal with directions to vacate its order denying mandate and to issue an alternative writ to be heard before that court.

On June 24, 1991, Shinchosha submitted to the California Supreme Court an application for stay in the Superior Court action pending the filing and determination of a petition for certiorari. The California Supreme Court, without further written order, rejected Shinchosha's application for stay, on the ground that the Court no longer had jurisdiction over the case. Shinchosha then made an ex parte application to the Superior Court for the stay, which was denied on June 26, 1991.

On June 28, 1991, Shinchosha filed a motion to dismiss in the Superior Court based on *forum non conveniens*. The Superior Court denied that motion on August 19, 1991. At a hearing on August 30, 1991, the Superior Court further ordered that Shinchosha's response to the complaint be submitted on or before September 20, 1991. Shinchosha applied to this Court on September 6, 1991 for a stay of the proceedings in the Superior Court pending this Court's disposition of this petition for certiorari. That application for stay is still pending as of the filing of this petition.

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[4] Mr. Goto lives in Tokyo, visited California only once in 1966 for three or four days, derives no income from California, and, prior to this lawsuit, was unaware that any issues of *Focus* even reached California.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case because California courts, in asserting jurisdiction over this alien defendant, have acted in a manner that exceeds the limits of due process. There is a division among the circuits on this issue, creating a substantial likelihood that other courts will act in a similar manner. Resolving this question would eliminate the uncertainty arising from previous decisions of this Court.

I.

Basing Jurisdiction Solely on a Defendant's Awareness that its Products May Reach the Forum State Through the "Stream of Commerce" Violates Due Process.

This case raises the same issue that the Court addressed in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), but was unable to resolve: whether mere placement of a product in the "stream of commerce" may subject a defendant to personal jurisdiction in the forum State absent any showing of additional conduct by the defendant. In this case, a small number of allegedly defamatory *Focus* magazines, in which Shinchosha retained no possessory or financial interest, reached California solely through the acts of independent distributors over which Shinchosha had no control. In *Asahi*, the defendant Japanese manufacturer produced tire valve assemblies which it sold to a Taiwanese tire company. That company then incorporated the assemblies into its tires and distributed the tires throughout the world. The tire company was named as a defendant in a products liability action in California for injuries caused by its tires, and cross-claimed against Asahi for indemnity.

In *Asahi*, the court unanimously decided that the exercise of jurisdiction over the defendant would violate the Due Process Clause by "offend[ing] 'traditional notions of fair play and substantial justice.' " *Id.* at 113 (citation omitted). Because of the "severe" burden that litigation in California would place on the alien defendant, this Court concluded that jurisdiction over *Asahi* "would be unreasonable and unfair." *Id.* at 116.[5] On the alternative ground of the "stream of commerce" issue, however, the members of this Court diverged and created three separate and conflicting opinions.

Writing for four members of this Court, Justice O'Connor found either "mere placement" or "knowledge of distribution" to be an insufficient basis for asserting personal jurisdiction:

> The 'substantial connection,' . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State* . . . . The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.

Id. at 112 (citations omitted) (emphasis in original). Because they found no evidence of such a "purposeful act," these four justices determined that "the exertion of personal jurisdiction over *Asahi* by the Superior Court of California exceeds the limits of due process." *Id.* at 113. By contrast, Justice Brennan concluded, in an opinion joined by three other members of this Court, that "juris-

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[5]The same "severe burden" placed on the alien defendant in *Asahi* is present here; this makes the Superior Court's decision inconsistent with *Asahi* and Shinchosha respectfully requests summary reversal.

diction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause." According to these members of the Court, no further showing of "purposeful availment" is required. *Id.* at 117.

In a third opinion, written by Justice Stevens, three justices concluded that resolution of this "stream of commerce" issue was not necessary to the Court's opinion, once the Court decided that jurisdiction was unreasonable. Even assuming the tests were relevant, these members of the Court felt that it had been misapplied. They concluded that *Asahi* had done far more than simply place its products in the stream of commerce, and that its conduct was substantial enough to constitute "purposeful availment." *Id.* at 122 ("a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment' ").

By raising the same "stream of commerce" issue again, this case provides the Court with an opportunity to clarify what was left unresolved in *Asahi*: whether it is consistent with due process to base jurisdiction solely on the defendant's potential awareness that its products may reach the forum state through the stream of commerce. Moreover, this case presents the issue even more squarely than *Asahi* did, as this defendant's relationship to California is so attenuated. The article on which this action is based was printed in *Focus* magazine in Japan, in Japanese, and directed to an exclusively Japanese readership.[6] Any distribution of *Focus* magazine outside of Japan occurs

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[6]Even if this Court were to adopt the "stream of commerce" argument, it must still determine whether the "stream of commerce" has national boundaries for jurisdictional purposes. In other words, did Shinchosha's sale of its Japanese language magazines to Japa-

through the independent activities of Japanese distribution companies. Shinchosha retains no financial or possessory interest in the magazines and the distribution companies may not return any unsold copies.

Moreover, these independent distributors send only a miniscule number of issues of *Focus* magazines to California (40 issues per week out of a total press run of 600,000). This contrasts with the defendant's deliveries in *Asahi* of "over 100,000 units annually over a period of several years," which led four members of this Court to conclude that there was "purposeful availment" in *Asahi*. *Id.* at 122 (Stevens, J., concurring in part). Because Shinchosha's only conceivable "contact" with California was its potential knowledge that a small number of its publications reached the state, this case provides an even better vehicle than *Asahi* for determining whether this knowledge, on its own, is a sufficient ground on which to base personal jurisdiction.

By presenting in sharp relief the burdens imposed on a defendant who has no direct contact with the forum state, this case also provides a persuasive example showing why "mere placement" or "knowledge of distribution" cannot be a valid basis for personal jurisdiction. In discussing the requirement of "minimum contacts," this Court has stated that "[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (emphasis in original), *quoting McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957). Where, as here, there is no evidence of purposeful acts by the defendant or of any "substantial connection" with the

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nese distributors constitute a placement of its product into the relevant "stream of commerce" for purposes of a California lawsuit?

forum state, there can be no finding of "minimum contacts." In the absence of such evidence, the exercise of jurisdiction over a nonresident is clearly unconstitutional.

In *Asahi,* this Court emphasized that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders," and advised that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Id.* at 114-115 (citations omitted). These concerns are more likely to be ignored, as they were in the instant case, if a court chooses to base jurisdiction on the defendant's mere awareness that its products reach the forum state.

Not only does the assertion of jurisdiction over foreign defendants impose substantial burdens on them, but it implies that the foreign forum, in this case Japan, is an inadequate alternative. Such assumptions invite forum shopping on an international scale and are inconsistent with this Court's rejection in other cases of an assumption that the American forum is always preferable. *See Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 517 n.11 (1974) (The idea that American standards must govern "demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of the United States law over the laws of other countries."); *M/S BREMEN, et al. v. Zapata Off-Shore Co.,* 407 U.S. 1, 9 (1972) ("We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.")[7]

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[7]*See also Lockman Foundation v. Evangelical Alliance Mission, et al.,* 930 F.2d 764 (9th Cir. 1991) (court found Japan to be an

II.

Jurisdiction Over an Alien Publisher for Defamation is Unreasonable When Distribution of the Allegedly Defamatory Publication in the Forum State is Minimal.

An additional, but related, issue raised by this case is whether a publisher can be sued for libel when only 40 copies of its foreign language publication are distributed in the forum state through the independent actions of third parties. In *Keeton v. Hustler Magazine,* 465 U.S. 770 (1984), this Court held that New Hampshire had a sufficient interest in preventing the "tort" of libel within its borders where a "substantial number" of Hustler magazines were sold in the state. 465 U.S. at 781.[8] The Court did not decide, however, that any number of publications, no matter how small, could subject a publisher to suit in that state.

In *Keeton,* the defendant sold, through independent distributors, approximately 10,000 to 15,000 copies of its "national publication" in New Hampshire each month. *Id.* at 772. Consequently, this Court concluded that Hustler magazine was "carrying on a 'part of its general business'

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adequate alternative forum). Should this Court find that jurisdiction over Shinchosha is improper, the Statute of Limitations on Mr. Shimizu's claim has not yet run under Japanese law.

[8]In *Keeton,* this Court also held that New Hampshire's jurisdiction was in part based on its "interest in cooperating with other States in the application of the 'single publication rule.' " 465 U.S. at 777-78. Because the defendant in this case is located in another country (thereby implicating the libel laws of that country, rather than simply the laws of another state), the Court might well conclude that the state interests articulated in *Keeton* are not present here. Indeed, the Superior Court made no finding that California law applied or that California has any interest in this dispute.

in New Hampshire," that its "regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction," and that the defendant must therefore "reasonably anticipate being haled into court here." *Id.* at 773 and 780-81.[9] In contrast, here only forty copies out of 600,000 (less than $^1/_{100}$ of one percent) copies of a Japanese language magazine arrived in California through independent distributors. Under such circumstances, it would seem that the state's interest in providing a forum would be significantly smaller than in *Keeton* and that the "minimum contacts" standard would not be met.

A consideration of the level of circulation of the allegedly defamatory publication in the forum state is consistent with the idea that the defendant must "reasonably anticipate being haled into court [in that state.]" A number of courts in California and elsewhere have cited this factor, either in terms of the total number of issues circulated in the forum state or in terms of the percentage of the total, when analyzing whether jurisdiction is proper. In *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship, Hong Kong,* 146 Cal. App. 3d 440, 194 Cal. Rptr. 240 (1983), the California Court of Appeal held in a defamation case that a California court had no jurisdiction over a magazine published abroad in a foreign language where a minimal number of copies arrived in California. The defendant sent approximately seven percent (7%) of the copies of the publication to California, while the rest were distributed abroad. Because the

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[9]Likewise, in *Calder v. Jones,* 465 U.S. 783, 785 (1983), another defamation case decided the same day as *Keeton,* this Court found jurisdiction over a reporter and editor of *The National Enquirer* to be proper where the allegedly defamatory publication was a "national weekly newspaper with a total circulation of over 5 million."

vast majority of copies of the defendant's magazine were circulated outside of California, the court found that jurisdiction would offend due process.

Likewise, in *Church of Scientology of California v. Adams,* 584 F.2d 893 (9th Cir. 1978), the Ninth Circuit Court of Appeals determined that "the defendant had little reason to expect a risk of injury from defamation in [California]" based on the defendants' knowledge that no more than 150 issues — 4/100 of 1% of total circulation — would be distributed in that state.[10] *See also Sipple v. Des Moines Register & Tribune Co.,* 82 Cal. App. 3d 143, 147 Cal. Rptr, 59 (1978) (no jurisdiction where each of the newspapers in question had a circulation in the forum state of less than 3/10 of 1% of total circulation).

Clearly, these courts interpreted the requirement that the publisher circulate a "substantial number" of its publications in the forum state in a manner that is vastly different than the Superior Court's decision in the instant case. Based on the minimal level of distribution of the

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[10] Cases that permitted the exercise of jurisdiction found significantly more circulation than at issue here. *See Army Times Publishing Co. v. Watts,* 730 F.2d 1393, 1399-1400 (11th Cir. 1984) (court found sufficient contacts with Alabama existed where defendant had "nationwide publishing operation" and "national marketing service," and Alabama was "a significant market, if not one of several principal markets, for the newspaper"); *Samad v. High Society Magazine,* 10 Med. L. Rptr. 1930, 1931 (D.V.I. 1984) (court found sufficient contacts with Virgin Islands existed where population was only 100,000 and circulation in Islands was 275, making distribution "quite substantial relative to the population of this territory," unlike "populous jurisdictions such as New York and California"); *Akbar v. New York Magazine,* 490 F. Supp. 60 (D.D.C. 1980) (court found sufficient contacts with District existed where magazine distributed approximately 3,000 issues per week in District, constituting 0.7% of total circulation).

allegedly defamatory publications in those cases, the courts found jurisdiction to be unreasonable. Jurdisdiction in this case is similarly unwarranted.

III.

The Unresolved Issues In *Asahi* and *Keeton* Create Confusion Among Courts in Judging Whether "Minimum Contacts" Exist.

Asahi and *Keeton* left open the question of how much contact with the state is enough to assert jurisdiction. These cases have created uncertainty in this area of the law, permitting courts to assert jurisdiction over nonresidents based on the most minimal of contacts. Although the scope of personal jurisdiction continues to be a critical issue for American courts, this uncertainty leaves unresolved the confusion among the circuits. Prior to *Asahi,* courts differed over the scope of the "minimum contacts" required to allow the exercise of jurisdiction. *See Asahi,* 480 U.S. at 110-12, and 117-18 (discussing the Fifth and Ninth Circuit Courts of Appeals' adoption of a rule permitting jurisdiction to be based on "mere foreseeability or awareness," and the Eighth Circuit Court of Appeals' rejection of that rule). The difference among the circuits has not only persisted since *Asahi,* but has expanded.[11]

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[11]The following cases either expressly or impliedly adopt the "mere foreseeability" rule: *Irving v. Owens-Corning Fiberglass Corp.,* 864 F.2d 383, 384-387 (5th Cir. 1989), *cert. denied,* 110 S. Ct. 83 (1989); *In re San Juan Dupont Plaza Hotel Fire Lit.,* 742 F. Supp. 717, 722 (D. Puerto Rico 1990); *Hall v. Zambelli,* 669 F. Supp. 753, 756 (S.D. W. Va. 1987). The following cases have required more than "mere foreseeability": *Morris v. SSE, Inc.,* 843 F.2d 489, 493-94 (11th Cir. 1988); *Tomashevsky v. Komori Printing Machinery Co., Ltd.,* 715 F. Supp. 1562, 1566 (S.D. Fla. 1989); *Smith v. Dainichi Kinzoku*

This conflict between the circuits has resulted from the uncertainty in this area of the law, leaving defendants in similar circumstances to be treated differently based solely on the state seeking to assert jurisdiction. This uncertainty is particularly troubling when the defendants are foreign nationals, as the assertion of jurisdiction over those defendants can affect international relations and trade.

This case not only deserves attention because it raises issues left unresolved by *Asahi* and *Keeton*, but also because this particular situation is likely to recur. With the growth in international commerce, it is fair to assume that there will be an increasing number of cases such as this, where an independent third party causes incidental distribution of an alien defendant's product in the forum State. If this Court does not resolve the issue of whether a defendant's mere awareness of this distribution, without more, can subject it to jurisdiction in the forum state, the courts will continue to reach conflicting results.

Kogyo Co., 680 F. Supp. 847, 854 (W.D. Tex. 1988); *Sturgill v. Chema Nord Delekkemi Nobel Indus.*, 687 F. Supp. 351, 353-54 (S.D. Ohio 1988). *See generally* Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 Ky. L. J. 243, 275-83 (1989)

CONCLUSION

For the foregoing reasons we respectfully submit that the Court should grant a writ of certiorari to review the decision of the Supreme Court of California.

Respectfully Submitted,

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Shinchosha Company

APPENDIX A

APPENDIX A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Date: April 16, 1991
Honorable ROBERT H. O'BRIEN, Judge
Ellis Fajardo, Court Attendant
Darolyn Jensen, Deputy Clerk
None, Reporter

BC 002 057
SHIGETO SHIMIZU
Counsel for Plaintiff:
No Appearances
FOCUS MAGAZINE, ET AL
Counsel for Defendant:

NATURE OF PROCEEDINGS:
RULING ON MOTION OF DEFENDANT SHINCHOSHA CO. TO QUASH SERVICE OF SUMMONS

Above motion, taken under submission on 4-12-91, is hereby ruled on as follows:

Plaintiff has the burden of establishing jurisdiction by preponderance of evidence. *Wilson vs. Eddy*, 2 Cal. App. 3d, 613, 617.

Plaintiff has presented declarations supporting his contention. The declarations generally go toward establishing the number of copies of FOCUS Magazine sold or presented in Southern California. Leaving aside the obvious hearsay statements as to what was told the declarants, (Inoue and Rikimaru), they do establish, by the declarants personally having seen, that a substantial

number of defendant's publications were carried by California bookstores (paragraph 3 of Inoue 2-15-91 declaration; paragraphs 3-5, 7, Rikimaru declaration). Further, plaintiff has shown that FOCUS Magazine, the subject of this lawsuit, is sold in California (paragraph 6 of Rikimaru declaration; Response to Request for Admissions #6) by virtue of the fact defendant does sell a substantial number of publications in California, including FOCUS Magazine.

Unlike *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship*, 146 Cal. App. 3d 440, defendant does business in California in a broad manner, to wit, as a publisher it sells its product (albeit through intermediate distributors) in the usual stream of business manifested by the product reaching the penultimate destination, the book store. Defendant is in the business of selling books and magazines and is aware of the world wide distribution of its products (Umeda declaration). It publishes and sells by using as apparent systematic business process whereby its products are distributed inside and outside Japan (paragraph 3 of Umeda declaration). The fact its product reaches the bookstores in California is not surprising and manifests its wide ranging business activities.

Evangelize China Fellowship, Inc. relied on authorities where only a few copies of a single publication of defendant reached California, no research was done in California, and little of California residents were made. See *Evangelize* at 448-449.

Here, although only a few copies of FOCUS Magazine reach California, defendant's business in Calfornia is much broader by virtue of more of it's published products being sold in California. The subject article specifically concerned a Calfornia resident. The accompanying photo-

graph of plaintiff was obviously taken in California, presumably by an agent or representative of defendant. (4-10-91 declaration of Shimizo, paragraph 4). This is not a situation where defendant's California activities are occasional. Defendants' activities in California are wide ranging. The fact that a substantial percentage of FOCUS Magazines are not sole in California is not determinative. That fact is only one factor in evaluating defendant's business contacts here.

In evaluating the "relationships among the defendant, the forum and the litigation", the court concludes that exercise of California jurisdiction is consistent with due process of the law. See *Evangelize* at 445.

The motion is denied. Defendants to respond to the complaint no later than 4-26-91. Status conference is set for 5-31-91 at 8:00 a.m. in Department 62.

Copies of this minute order are sent by U.S. Mail this date addressed as follows:

LAW OFFICES OF PETER A. SCHEY
256 S. OCCIDENTAL BLVD.
LOS ANGELES, CA 90057

MORRISON & FOERSTER
333 S. GRAND, 38TH FLOOR
LOS ANGELES, CA 90071-3168

Minutes Entered: April 16, 1991

APPENDIX B

APPENDIX B

B058208

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SHINCHOSHA CO. and AKIO GOTO,
Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,

SHIGETO SHIMIZU,
Real Party in Interest.

(L.A.S.C. No. BC 002057)
(Robert H. O'Brien, Judge)

ORDER

Court of Appeal, Second District Filed May 16, 1991.
Robert N. Wilson, Clerk
P. Doyon, Deputy Clerk

THE COURT*:

The petition for writ of mandate/stay, filed May 3, 1991; and the opposition thereto, filed May 10, 1991, have been read and considered.

The petition is denied.

*SPENCER, P.J.
ORTEGA, J.
VOGEL, J.

APPENDIX C

APPENDIX C

No. 2/1 B058208-S021166

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SHINCHOSHA COMPANY and AKIO GOTO,
Petitioners
v.
SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,
Respondent
SHIGETO SHIMIZU,
Real Party in Interest

Supreme Court Filed June 20, 1991.

Robert Wandruff, Clerk, Deputy

The petition for review and request for stay brought by Shinchosha Company are DENIED.

The petition for review brought by Akio Goto is GRANTED. Review as to Akio Goto is transferred to the Court of Appeal, Second Appellate District, Division One, with directions to vacate its order denying mandate and to issue an alternative writ to be heard before that court when the proceeding is ordered on calendar.

Pending further order of the Court of Appeal, all proceedings against Akio Goto in Los Angeles County Superior Court case number BC002057, entitled Shimizu v. Focus Magazine et al. are hereby stayed.

Arabian
Acting Chief Justice

Mosk
Associate Justice

Broussard
Associate Justice

Panelli
Associate Justice

Kennard
Associate Justice

Baxter
Associate Justice

Associate Justice

FILED
NOV 1 1991
OFFICE OF THE CLERK

(2)

No. 91-478

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

SHINCHOSHA COMPANY,
Petitioner,
vs.
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent,

SHIGETO SHIMIZU,
Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the trial court abused its discretion in concluding that subject matter jurisdiction over plaintiff's claims against defendant Shinchosha would not offend due process where the trial court found that "[d]efendant's activities in California are wide ranging," "Focus magazine, the subject of this lawsuit, is sold in California," defendant "does sell a substantial number of publications in California," it "does business in California in a broad manner," it "sells its products (albeit through intermediate distributors) in the usual stream of business," it "is aware of the world wide distribution of its products," "[t]he subject article specifically concerned a California resident," and "the accompanying photographs of plaintiff [were] obviously taken in California ... by an agent or representative of defendant [who defendant admits it paid]."

TABLE OF CONTENTS

QUESTION PRESENTED ii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

ARGUMENT 14

I. **NEITHER THE FACTS OF THIS CASE NOR THE ISSUES PRESENTED WARRANT PLENARY PRE-TRIAL REVIEW BY THE SUPREME COURT** 14

II. **THE SUPERIOR COURT CLEARLY DID NOT ABUSE ITS DISCRETION IN REFUSING TO QUASH SERVICE OF THE SUMMONS AND COMPLAINT IN THIS CASE** 20

A. California Courts Possess Broad Authority To Assert Jurisdiction Over Foreign Defendants Whose Tortious Conduct Results In Injury To A Resident 20

B. Defendant Is Subject To The General Jurisdiction of California 20

C. Even If Defendant's Contacts Were Insufficient To Sustain General Jurisdiction, They Are Clearly Sufficient to Establish Limited Jurisdiction 22

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

500 Motors, Inc v. Superior Court,
122 Cal.App.3d 827, 176 Cal.Rptr. 349 (1981)..... 20

Asahi v. Metal Industry Co. v. Superior Court,
480 U.S. 102 (1987)..... passim

Bartlett v. Superior Court,
86 Cal.App.3d 72, 150 Cal. Rptr. 25 (1978) 23

Buckeye Boiler Co. v. Superior Court, 71 Cal.2d 893,
80 Cal. Rptr. 113, 458 P.2d 57 (1969) 22

Burrus v. Municipal Court, 36 Cal.App.3d 233 (1973)... 14

Cabral v. State Board of Control, 112 Cal.App.3d 1012,
169 Cal.Rptr. 604 (1980) 5

Calder v. Jones, 465 U.S. 781 (1984)..... 23,26

Cornelison v. Chaney, 16 Cal.3d 143 (1976)..... 26

Dermegerdich v. Rank, 151 Cal.App.3d 848 (1984)..... 5

Evangelize China Fellowship, Inc. v. Evangelize
China Fellowship, 146 Cal.App.3d 468,
194 Cal.Rptr. 240 (1983)..... 26

Helicopteros Nacionales de Columbia v. Hall,
466 U.S. 408, 414, 104 S.Ct. 1868, 1872 (1984)..... 21

Irving v. Owens-Corning Fiberglass Corp.,
864 F.2d 383 (5th Cir. 1989), *cert. den.*,
110 S.Ct. 83 (1989)..... 17

Jones v. Calder, 187 Cal.Rptr. 825 (1982)..... 24

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984)... passim

Matter of Udagawa, 14 I&N Dec. 578, (BIA 1974)..... 5

Morris v. SSE, Inc., 843 F.2d 498 (11th Cir. 1988)..... 17

Regie Nationale Des Usines Renault v. Superior Court, 208 Cal.App.2d 702, 703, 25 Cal.Rptr. 530..... 22

Rollins Burdick Hunter of S. Cal. Inc. v. Alexander & Alexander Services, Inc., 206 Cal.App.3d 1, 253 Cal.Rptr. 338 (1988)..... 20

Seagate Technology v. AJ Kogyo Co. Ltd., 219 Cal.App.3d 703, 268 Cal.Rptr. 586 (1990)..... 23

Secrest Machine Corp. v. Superior Court, 33 Cal.3d 664, 190 Cal.Rptr. 175 (1983)..... 21

Shimizu v. Department of State, et al., Cv. No. 89-2741-WMB(Ex) (C.D. Cal.)..... 4,7

Sibley v. Superior Court, 16 Cal.3d 442, 128 Cal. Rptr. 34 (1976), *cert. den.* 429 U.S. 826 (1976)..... 20,23

Tiffany Records, Inc. v. M.B. Krupp Distributors, Inc., 276 C.A.2d 610, 617, 81 Cal.Rptr. 320 (1969)..... 22,28

United States ex rel. Knauff v. McGrath, October Term, 1949, printed in 96 Cong. Rec. A3750..... 11

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559 (1980)..... 22

Ziller Electronics Lab GmbH v. Superior Court, 206 Cal.App.3d 1222, 1233, 254 Cal.Rptr. 410 (1988)... 21

Other Authorities

Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi 15

California Constitution, Art. I, § 2..... 9

California Evidence Code § 1070..... 9

Gordon and Mailman, *Immigration Law and Procedure*, § 12.03[c] at page 12-16..... 5

S.Rep.No. 1515, 81st Cong., 2d Sess. 563 (1950)..... 5

Mr. Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar Assn. Q. 393, 399-400 (1960)..... 16

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STATEMENT OF THE CASE

Defendant, already having delayed proceedings in the trial court, California Court of Appeal and Supreme Court for one and a half years by contesting jurisdiction on the basis of meritless arguments that "minimum contacts" sufficient to satisfy due process are absent in this case, now seeks the issuance of an extraordinary order granting *certiorari* prior to trial in the lower court.

Defendant Shinchosha is a Japanese corporation which publishes books and magazines sold by the tens of thousands in the United States. Defendant publishes, *inter alia*, a sensationalist tabloid called Focus magazine which is sold in the United States, including in California.

Plaintiff, a California resident, sued defendant Shinchosha for libel, slander and defamation as a result of an article published in Focus magazine which falsely states, *inter alia*, that plaintiff was arrested and charged with staying illegally in the United States with a forged passport and birth certificate, was pursued in the United States by an "international police dragnet" under suspicion of "swindling 20 million dollars," was rumored to have financial resources provided by an employee of a corporation "affiliated with some gangster organization," put the money that he illegally earned into real estate in California, and attempted to assume Mexican citizenship in California "with a forged Mexican birth certificate." The article concludes by noting that "mak[ing] a bit hit in speculation and hunt[ing] for real estate in overseas markets is a crime which modern Japanese are likely to conceive nowadays."

The California Superior Court, Court of Appeals and Supreme Court have all rejected defendant Shinchosha's claim that its contacts with the State of California are insufficient to justify the assumption of jurisdiction over plaintiff's claims. Associate Justice Sandra D. O'Connor denied defendant a stay pending adjudication of its petition for *certiorari*. Defendant has also recently filed in the trial court a motion to dismiss based on *forum non conveniens*, and a motion to strike the complaint. Both motions were denied. In neither case did defendant seek appellate review. After denying these motions the Superior Court ordered defendant to file an answer by October 12, 1991, which it did.

This case does not raise the "questions presented" and briefed by defendant Shinchosha in its petition for *certiorari*. The trial court did not assert jurisdiction based solely on the distribution of "40 copies of [defendant's] Japanese language magazine ... in California," nor solely on the basis of defendant's "placement of magazines into the stream of commerce," as asserted in defendant's "Questions Presented" and argued throughout the Petition. On the contrary, based on the evidence of record (despite defendant's refusal to fully respond to discovery regarding their California contacts), the Superior Court held that "[d]efendant's activities in California are wide ranging." Ruling on Motion of Defendant Shinchosha Co. to Quash Service of Summons, April 16, 1991 ("Ruling on Motion to Quash"), p. 2.[1] The Superior Court concluded, *inter alia*, that

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[1] Exhibit A to Defendant's Application for Stay.

> Focus magazine, the subject of this lawsuit, is sold in California ... [D]efendant does sell a substantial number of publications in California ... [D]efendant does business in California in a broad manner ... [Defendant] sells its products (albeit through intermediate distributors) in the usual stream of business .. [Defendant] is aware of the world wide distribution of its products ... It publishes and sells by using an apparent systematic business process whereby its products are distributed inside and outside of Japan ... The fact its product reaches the bookstores in California is not surprising and manifests its wide ranging business activities ... The subject article specifically concerned a California resident. The accompanying photograph of plaintiff was obviously taken in California, presumably by an agent or representative of defendant ... This is not a situation where defendant's California activities are occasional ...

Ruling on Motion to Quash, p. 1-2. Contrary to defendant's claim, the Superior Court did not rule that defendant "conducts no business activity in California," nor did it rule that defendant's "placement of [Focus magazine] into the stream of commerce," "without other action by the publisher," justified the assertion of jurisdiction. Petition at p. i (Questions Presented). In short, defendant appears--without ever saying so--to really challenge the factual findings of the trial court, while pretending to challenge its legal conclusions. Defendant's brief is based entirely upon factual assertions rejected by the trial court.

Defendant has now filed a verified answer. This case is finally moving forward and defendant presents no meritorious argument why this Court should now undertake the extraordinary action of granting *certiorari* based upon defendant's disagreement with the trial court's findings of fact regarding subject matter jurisdiction.

STATEMENT OF FACTS

The verified complaint on file in this action alleges that plaintiff is a businessman and resident of Los Angeles, California since 1988. Complaint for Damages for Libel, Slander and Defamation ("Complaint"), ¶ 5; Opposition to Defendant's Motion to Quash, Exhibit 1, Declaration of plaintiff Shigeto Shimizu ("Shimizu Dec. I") ¶ 1. He is a single parent and the sole provider for his five year old United States citizen daughter who lives with him in Los Angeles. Further Supplement to Plaintiff's Opposition to Defendant's Motion to Quash, Exhibit 1, Dec. of Shigeto Shimizu ("Shimizu Dec. II") ¶ 2. Plaintiff Shimizu possesses a valid investor's visa and pursuant thereto has made substantial investments in the United States.[2] Under the Immigration and Nationality Act, unlike most non-immigrants, the investor "E" visa (which plaintiff possesses) does not require that the alien

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[2] *See* Plaintiff's Reply Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment pp. 18-19, filed in *Shimizu v. Department of State, INS*, Cv. No. 89-2741-WMB (C.D. Cal.), attached as Exhibit E to Defendant's Reply to Plaintiff's Opposition to Motion to Quash Service of Summons, filed in this case April 10, 1991.

enter the United States "temporarily." Gordon and Mailman, *Immigration Law and Procedure*, § 12.03[c] at page 12-16.[3] In any event, numerous courts have held that California resident status has little to do with federal immigration status.[4] Plaintiff is a taxpayer and owns the home in which he and his five-year old daughter reside. Shimizu Dec. II at ¶ 3. Plaintiff has enjoyed a good reputation generally and in his occupation. *Id.*

Defendant Shinchosha claims to be resident in Japan. It is the publisher of Focus magazine. Focus is a sensationalist tabloid which uses large photographs (therefore the name "Focus") to expose its subjects. A recent survey of awards for libel in Japan found 21 reported decisions between 1980 and 1989. Of these 21 decisions, five (about 1/4 of all reported libel and defamation awards in Japan) involved defendant's Focus magazine. *Id.* In short, Focus magazine is Japan's

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[3] "E" visa holders "need not show that they are coming to the United States for a specific, limited period of time." S.Rep.No. 1515, 81st Cong., 2d Sess. 563 (1950); *Matter of Udagawa*, 14 I&N Dec. 578, 581 n. 3 (BIA 1974); *Immigration Law and Procedure, supra*, § 17.08 at page 17-46.

[4] *See, e.g., Cabral v. State Board of Control*, 112 Cal.App.3d 1012, 1016-17, 169 Cal.Rptr. 604 (1980) (undocumented aliens considered "residents of the State" for purposes of victim of violent crime benefits); *Dermegerdich v. Rank*, 151 Cal.App.3d 848 (1984) (undocumented aliens considered residents for purposes of certain medical benefits under the California Welfare and Institutions Code).

"National Inquirer," and is admittedly distributed to and read by the Japanese community world-wide.

On May 26, 1989, defendant published and circulated an article in Focus magazine regarding plaintiff which is libelous on its face, slanderous and defamatory. The article recklessly, negligently, intentionally and falsely states *inter alia* that:

> Plaintiff was arrested and charged with staying illegally in the United States with a forged passport, forged permanent residence certification card, and forged birth certificate ... Plaintiff was pursued in [in the United States by] an international police dragnet under suspicion of swindling 20 million dollars ... Plaintiff conducted a stock trading manipulation on a massive scale on the Osaka Stock Exchange in 1985 ... Plaintiff was rumored to have financial resources provided by an employee of a corporation affiliated with some gangster organization ... Plaintiff put the money that he earned [from the alleged stock manipulation] into real estate [in California] ... Plaintiff attempted to assume Mexican citizenship [in California] with a forged Mexican birth certificate.

Complaint ¶¶ 6-7. The article also states that plaintiff "entered [the United States] at Los Angeles on [a] tourist visa and put the money he earned [allegedly through a stock "swindle"] into real estate [in Los Angeles], that "among the properties he invested in [in California] were a residential palace ... in Palos Verdes [readers are then referred to a photograph of plaintiff's "palace"], a condo [readers are again referred to a photograph of the condo], [and] Yoro-no-Taki restaurant [readers are referred to a photograph of the Los Angeles restaurant]." *Id.*

Readers are then told for the second time that plaintiff "attempted to assume a [sic] Mexican citizenship with a forged Mexican birth certificate [in California] ... but upon the request made by the Japanese Police authorities, the U.S. Immigration and Naturalization Service and Los Angeles Police Department finally arrested him as shown in the photograph." Complaint, Exhibit 1, pp. 3-4 (English translation of article). Readers are referred to a page-size unauthorized photograph of plaintiff in leg chains and handcuffs taken while plaintiff was in INS custody in a supposedly secure area of the Los Angeles federal building. The article concludes that "[m]ak[ing] a big hit in speculation and hunt[ing] for real estate in overseas markets is a crime which modern Japanese are likely to conceive nowadays." *Id.* p. 4

Plaintiff was arrested by the INS (not the Los Angeles police Department) and briefly detained, but it was for overstaying a visitor's visa, a relatively minor charge later withdrawn by the INS,[5] not for possessing "a forged passport,

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[5] In *Shimizu v. Department of State, et al.*, Cv. No. 89-2741-WMB(Ex) (C.D. Cal.) the district court issued summary judgment in favor of Mr. Shimizu by order dated July 30, 1990. The order required the Department of State to reissue to Mr. Shimizu an "investors" visa improperly revoked during a brief trip Mr. Shimizu took to Canada in 1988. Mr. Shimizu was permitted to return to the United States on a "visitors' visa to wrap up his affairs after his investor visa was revoked. He returned on the visitor's visa and overstayed. After his arrest, the subject of the Focus magazine article, plaintiff successfully challenged the revocation of his investor visa. In compliance with the district court order, Mr. Shimizu's investor's visa has

forged permanent residence certification card, and forged birth certificate." Nor was plaintiff Shimizu "pursued in an international police dragnet." Nor has plaintiff ever had "financial resources provided by an employee of a corporation affiliated with some gangster organization." Nor has plaintiff "put the money that he earned [from illegal acts] into real estate [in California]."

As any reasonable person could foresee, the article "exposed plaintiff to hatred, contempt, and ridicule," Complaint ¶ 7. It is "false because plaintiff did not engage in the actions stated in the article." *Id.* ¶ 8. With "ordinary and reasonable care defendant could have discovered that the article was false and grossly libelous." *Id.* ¶ 10.

It is undisputed that this issue of Focus magazine was distributed, sold and read in California. As a proximate result of the above-described publication, plaintiff suffered damage in California to his reputation and business. *Id.* ¶¶ 15-16.

The declaration of Masahide Nogi, an employee of defendant and a Focus magazine reporter, states that he wrote the article in question. Motion to Quash Service of Summons, Declaration of Masahide Nogi ("Nogi Declaration"), ¶ 1.[6] He asserts that other than "a few" telephone calls with the

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been returned to him and the deportation hearing administratively terminated.

[6] Without explaining the basis for his claim, he states that when he wrote the article he "believed . . . that its contents were true and correct . . ." *Id.* Defendant has refused to respond to discovery which would explain the basis for this self-serving, untested assertion.

photographer in California who took the photographs accompanying the article, all of his "research" was done in Japan. *Id.* ¶ 3. He does not explain what that "research" involved, nor would defendant explain the scope of the writer's "research" in response to plaintiff's discovery requests. Defendant asserts that Mr. Nogi obtained "information" and the photographs published from a "photographer in Los Angeles," *id.* ¶ 7, but refused to disclose the identity of the Los Angeles "photographer," or provide any details about their relationship with him, improperly citing on his behalf a "newsmen's privilege" under Cal. Evid. Code § 1070.[7] Defendants

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[7] Defendant improperly asserted what they dubbed a "newsman's privilege" in refusing to disclose, *inter alia*, (1) the name, address and telephone number of the "photographer" who provided, for a fee, the information used to write the article (Form Interrog. 12.2); (2) the time, date and place of surveillance of plaintiff (Form Interrog. 13.1); (3) whether the photographer is an agent or independent contractor for defendants (Interrog. 4); (4) all documents to or from the photographer (Request for Production # 1). Article I, § 2 of the Cal. Constitution and Cal. Evid. Code § 1070 prevent a publisher from being "adjudged in contempt ... for refusing to disclose the source of any information procured ... for publication" when obtained from "a confidential source." Defendant publishers are not granted a "privilege" in damage actions to hide the names of their own reporters, photographers, agents or representatives. And even when a defendant in a civil action refuses to provide information about a *bona fide* informant, he "may be subject to a variety of other sanctions, including the entry of judgment against him. Neither Evidence Code § 1070 nor article I, section 2 protects a party against such sanctions." *Mitchell v. Superior Court*

similarly refused to provide other information relevant to the "minimum contacts" inquiry in response to plaintiff's discovery requests. Plaintiff filed a motion to compel further responses on the jurisdictional matters. Defendant was not required to more fully respond to discovery because the superior court denied defendant's jurisdictional challenge based on the evidence of record at the time.

Defendant's second declaration is executed by defendant Akio Goto, a director of defendant Shinchosha Co. and editor of Focus magazine. Motion to Quash Service of Summons, Declaration of Akio Goto ("Goto Declaration"), ¶ 1. He declares that Shinschosa publishes books and magazines, including the works of "American authors." *Id.* at 76, ¶ 2.[8] Mr. Goto declares that defendant "sells or consigns" its magazines to "three independent Japanese distributors" who in turn distribute the product around the world, including in California. *Id.* ¶ 6. Mr. Goto claims that he is "informed and believes" that only "40 (forty)" issues of Focus are delivered by

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(1984) 37 Cal.3d 268, 208 Cal.Rptr. 152, 154. Defendant's assertion of what it called the "newsman's" privilege was completely without legal justification. Even were this Court to grant certiorari, and conclude that the record did not support the Superior Court's exercise of discretion, the matter would likely be remanded for further proceedings on plaintiff's motion to compel discovery on issues relevant to the minimum contacts analysis.

[8] Defendant's summary responses to plaintiff's discovery requests fail to explain what "American authors" are published by defendant Shinchosha, or the nature of defendant's agreements with these American authors.

defendant's distributors to bookstores in California. *Id.* This inadmissible hearsay statement[9]--allegedly obtained from unknown persons associated with defendant's independent distributors--are rebutted by the personal observations of two declarants. A random check of three bookstores in Los Angeles uncovered about one hundred and ten (110) issues of Focus magazine available for purchase weekly (or about 473 per month or 5,676 per year).[10] While defendant Shinchosha repeatedly asserts that only "forty (40) copies of [Focus magazine] ... are distributed in California by [defendant's] independent distributors," Petition at i, 3, 10, 13, the Superior Court, citing plaintiff's declarations, which are "based upon personal observations at Los Angeles bookstores," agreed that defendant sells "a substantial number of publications in California, including Focus magazine." Ruling on Motion to Quash, p. 1 (emphasis added).

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[9] Plaintiff objected to their admissibility for purposes of determining subject matter jurisdiction. Supp. to Plaintiff's Opposition to Def.'s Motion to Quasn, filed April 11, 1991, at 2. Mr. Goto fails to identify the persons who provided him with the information, nor does he state how or from whom they purportedly obtained the information.

[10] Opposition to Motion to Quash, Exhibit 1, Declaration of Attorney Anne Inoue, filed Feb. 15, 1991 ("Inoue Declaration"); Supplement to Plaintiff's Opposition to Defendant's Motion to Quash, filed April 11, 1991, Exhibit 2, Declaration of Robert Rikimaru ("Rikimaru Declaration") at ¶ 6 (Mr. Rikimaru observed forty-five [45] issues of Focus magazine in one bookstore alone).

Furthermore, however many copies of Focus magazine are sold or otherwise distributed in California, defendant has said little about but has not disputed that thousands of its publications are sold in the State of California. On February 11, 1991, K. Anne Inoue, an attorney, visited a book store in Los Angeles and, *inter alia*, found an entire section of "Shinchosha Bunko," paperback fictions published by defendant Shinchosha. *Id.* In all she counted approximately 70 shelves carrying books published by defendant Shinchosha, for a total of approximately 4,200 books in one bookstore. Inoue Declaration at ¶ 3. *See also* Rikimaru Declaration at ¶¶ 4-5 (Mr. Rikimaru visited one book store and observed over 2,500 books and magazines published by defendant).[11]

In the face of these facts, Mr. Goto claims that defendant "derives no income from California." *Id.* ¶ 5. Defendant's books are not being given away in California. If defendant "derives no income from California" from the sale of thousands of its publications, it offers no explanation as to who is pocketing its profits.

Defendant never explained how its profits from the sales of its books in California are received. It claimed that it "sells or consigns" magazines, including Focus, to "three independent Japanese distributors" who in turn distribute the product in California. Goto Dec., ¶ 6. Defendant failed to provide any

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[11] Defendant never addresses how many copies of Focus magazine or its other publications are distributed and sold in other states in the United States. All of those sales would further support jurisdiction in California, the state of plaintiff's residence and where he experienced the injury.

details regarding the terms of such alleged sales or consignments, and refused to elaborate in its response to discovery sought by plaintiff on defendant's claim of insufficient contacts with California.

Defendant's oft-repeated but unsupported assertion that only 40 issues of Focus magazine are available in California is based solely on an untested, inadmissible hearsay statement.

In summary, defendants' limited responses to discovery and defendant Goto's declaration concede at least the following contacts with California:

1. A person in Los Angeles defendant refuses to identify (frivolously claiming a "newsman's" privilege) was paid by defendant for unauthorized photographers he had taken of plaintiff while in INS custody and for other "information" about plaintiff used in the article which is the subject of this case. Goto Declaration ¶ 7.
2. Defendant Shinchosha entered into at least one contract with an actor in California to do a tape-recording for defendants and sent an employee to California to make the recording with the actor (Gregory Peck). Defendant's Responses to Interrogatories, Response 4.
3. Defendant Shinchosha sent two employees -- a reporter and a photographer -- to Los Angeles to do research for at least one book published by defendant. *Id.*
4. Defendant Shinchosha directly sends 24 magazines to subscribers in California. *Id.* Response No. 6.
5. At the time of the publication of the article at issue defendant Shinchosha was aware that "some" issues of

Focus magazine were sold in the State of California. Response to Request for Admission No. 6.

7. Defendant Shinchosha accepted an advertisement for a "condominium complex in California" in one of its magazines. *Id.* at Response No. 12.

8. Defendants' responses to discovery and declarations provide no rebuttal to the evidence filed by plaintiff that thousands of defendants' publications are available for purchase in Los Angeles book stores.

9. The article in question concerns plaintiff who is a resident of California, falsely charging a variety of illegal acts in California.

ARGUMENT

I. NEITHER THE FACTS OF THIS CASE NOR THE ISSUES PRESENTED WARRANT PLENARY PRE-TRIAL REVIEW BY THE SUPREME COURT

It is well established law in the courts of California that absent extraordinary reason, "the parties must await a review by appeal from the final judgment." *Burrus v. Municipal Court*, 36 Cal.App.3d 233, 236 (1973). Defendant has failed to demonstrate an extraordinary reason justifying the intervention of the United States Supreme Court in the pre-trial proceedings now moving forward in the California trial court in this case. Defendant simply argues what any other defendant could claim after denial of a motion to quash service -- namely that, without the extraordinary intervention of the Supreme

Court, they will be required to proceed to trial. This is the same claim that could be made by every party who fails to succeed on a pre-trial dispositive motion. There is nothing extraordinary about defendants petition at all. "If reviewing courts made themselves routinely available to intervene [in trial court proceedings] whenever a litigant claimed a mistake has been made in a law-and-motion department, trials would be delayed, litigants would be vexed with multiple proceedings, and judgment appeals would be kept waiting." *Burrus*, 36 Cal.App.3d at 236.

> In a similar vein, Chief Justice Vinson noted in 1949 :
>
> The function of the Supreme Court is . . . to resolve conflicts of opinion on federal questions that have arisen among the lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court.

Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi (emphasis added).

This is not a case involving a federal issue. The issue of subject matter jurisdiction arises under California law -- the primary issue being whether the assertion of jurisdiction violates state notions of fundamental fairness and due process. Defendant's primary focus throughout has been on California's

due process limitation on subject matter jurisdiction. Mr. Justice Brennan has pointed out that "[c]rucial to the exercise of our *certiorari* jurisdiction is whether the controlling issue in the state court case is a federal issue, that is, an issue arising under the United States Constitution or under federal laws or treaties." Mr. Justice Brennan, State Court Decisions and the Supreme Court, 31 Penn. Bar Assn. Q. 393, 399-400 (1960).

Nor does this case involve a state court ruling in which the validity of a state statute is drawn into question on the ground of its being repugnant to federal law. The sole issue presented for review at this early stage of the case is the discretion exercised by a California state court judge, based upon findings of fact with which defendant disagrees, to deny a motion to quash service of a summons and complaint on the ground of insufficient minimum contacts.

Defendant argues this case "deserves attention" to clarify what was "left open" in *Asahi v. Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) and *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984). Petition at 15. The issue defendant claims "left open" in *Asahi* and *Keeton* is "how much contact with the [forum] state is enough to assert jurisdiction." *Id.* This is precisely the issue addressed by this Court in *Asahi*, *Keeton* and other "minimum contacts" cases (discussed *infra*). "How much" contact is required cannot be answered in one case. This Court has established the standards for lower courts to follow, and whether or not sufficient minimum contacts exist is generally a factual case-by-case determination. Defendant entirely fails to explain how Supreme Court review in this case, in which the facts are not yet fully developed

because defendant opposed discovery and defendant disagrees with the facts found by the trial court, the Court could in any meaningful way advance the law on minimum contacts for jurisdictional purposes. On the facts as determined by the trial court, rather than as presented in defendant's Petition, no current authority would disagree that the assumption of jurisdiction was proper. *See generally Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 384 (5th Cir. 1989), *cert. den.*, 110 S.Ct. 83 (1989); *Morris v. SSE, Inc.*, 843 F.2d 498, 493 (11th Cir. 1988). In fact, the law governing this case is clearly set forth in *Calder v. Jones*, 465 U.S. 781, 104 S.Ct. 1482 (1984) (personal jurisdiction over employees of out-of-state magazine proper where they should have recognized the effect of their article would damage a California resident).

In *Asahi* this Court unanimously decided that jurisdiction over the alien defendant would be "unreasonable and unfair." *Id.* at 116. The Court divided on the issue whether the placement of manufactured goods in the "stream of commerce" alone was sufficient to establish a basis for minimum contacts and therefore jurisdiction. Three Justices felt the analysis was unnecessary given the Court's decision that jurisdiction was unreasonable. Justice O'Connor, writing for four justices concluded that "mere placement" of goods in the stream of commerce was insufficient to establish minimum contacts. *Id.* at 112. And Justice Brennan, writing for four Justices, concluded that jurisdiction premised on the placement of a product into the stream of commerce "is consistent with the Due Process Clause." *Id.* at 117.

However, as we have already pointed out, this case does not raise the same issue whether "defendant's mere awareness of distribution" in the "stream of commerce" gives rise to jurisdiction. Petition at 16. As the Superior Court found, based on more than sufficient evidence, defendant has "wide ranging" business ties to California making jurisdiction proper over its publication of a highly defamatory article about a California resident and events that allegedly took place in California. In short, this is not a "stream of commerce" case, but a libel and defamation action. As discussed below, this Court has adopted a different approach to minimum contacts in the context of libel actions versus the transportation of other goods across state or national boundaries.

Furthermore, this case does not present "an opportunity" to address the questions posed by defendant because the lower court did not rule on the questions briefed by defendant.[12] On the contrary, based on the evidence of record (despite defendant's refusal to fully respond to discovery regarding their

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[12] Defendant repeats its erroneous assertion regarding what the Superior Court ruled throughout its Petition. *See, e.g.* Petition at i (Questions Presented), 5 (jurisdiction assumed "by virtue of [defendant's] published products being sold in California"), 7 (jurisdiction was based "solely on defendant's awareness that its products may reach the forum state through the 'stream of commerce'"), 10 (defendant's "only conceivable 'contact' with California was its potential knowledge that a small number of its publications reached the state"). As defendant must surely know, and as a review of the Superior Court order clearly indicates, none of these statements are accurate.

California-contacts), the Superior Court held that "[d]efendant's activities in California are wide ranging." Ruling on Motion to Quash, p. 2. As noted in the Statement of Facts, *supra*, the Superior Court concluded, *inter alia,* that (1) Focus magazine, the subject of this lawsuit, "is sold in California," (2) "[D]efendant does sell a substantial number of publications in California, (3) "[D]efendant does business in California in a broad manner," (4) "[Defendant] sells its products (albeit through intermediate distributors) in the usual stream of business," (5) "[Defendant] is aware of the world wide distribution of its products," (6) "[Defendant] publishes and sells by using an apparent systematic business process whereby its products are distributed inside and outside of Japan, (7) "The fact [defendant's] product reaches the bookstores in California is not surprising and manifests its wide ranging business activities," (8) "The subject article specifically concerned a California resident," (9) "The accompanying photograph of plaintiff was obviously taken in California, presumably by an agent or representative of defendant," (10) "This is not a situation where defendant's California activities are occasional ." Ruling on Motion to Quash, p. 1-2. Contrary to defendant's repeated assertions to this Court, the Superior Court's order clearly did not rule that minimum contacts sufficient to satisfy due process existed "solely" based on "the defendant's awareness that its products reach the forum state through the stream of commerce."

Therefore, even if this Court believed the question posed by defendant (whether jurisdiction is proper based "solely" on defendant's "awareness that its products reach the forum state

through the 'stream of commerce'") was worthy of plenary review, the question is plainly not presented for review in this case.

A petition for certiorari is in substance a request for the Court to exercise its discretionary power to review the case, a request which may be denied because the Court does not regard the points raised as sufficiently important for it to review. There is no reason to believe that this case raises the kind of important issues to which the Court limits its grant of petitions for certiorari.

II. THE SUPERIOR COURT CLEARLY DID NOT ABUSE ITS DISCRETION IN REFUSING TO QUASH SERVICE OF THE SUMMONS AND COMPLAINT IN THIS CASE

A. CALIFORNIA COURTS POSSESS BROAD AUTHORITY TO ASSERT JURISDICTION OVER FOREIGN DEFENDANTS WHOSE TORTIOUS CONDUCT RESULTS IN INJURY TO A RESIDENT

California Code of Civil Procedure § 410.10 provides that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." California has "chosen to provide the broadest possible form of jurisdiction to its courts." *500 Motors, Inc v. Superior Court*, 122 Cal.App.3d 827, 176 Cal.Rptr. 349 (1981) (emphasis added), properly "limited only by constitutional considerations." *Rollins Burdick Hunter of S. Cal. Inc. v. Alexander & Alexander Services, Inc.*, 206

Cal.App.3d 1, 5, 253 Cal.Rptr. 338 (1988), *citing Sibley v. Superior Court*, 16 Cal.3d 442, 445, 128 Cal. Rptr. 34, 36 (1976), *cert. den.* 429 U.S. 826 (1976). A plaintiff need only establish by a "preponderance of the evidence that all necessary jurisdictional criteria are met." Ziller Electronics Lab GmbH v. Superior Court, 206 Cal.App.3d 1222, 1233, 254 Cal.Rptr. 410 (1988) (citations omitted).

B. DEFENDANT IS SUBJECT TO THE GENERAL JURISDICTION OF CALIFORNIA

Regardless of whether defendant sells one or one thousand copies of Focus magazine in the state of California, the courts may assert "general" jurisdiction over defendant in light of its significant contacts with the state. It is unrebutted that defendant's products, primarily books and magazines, are widely distributed in California. In one book store alone in Los Angeles plaintiff has identified over four thousand books published by defendant. Inoue Declaration at ¶ 3. In addition, defendant has accepted advertisements from California, has entered into contracts in California, and has sent employees to California to research books.

When a defendant has sufficiently extensive contacts with the forum state, it may be subject to suit there on all claims wherever they arise. *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414, 80 L.Ed.2d 404, 411, 104 S.Ct. 1868, 1872 (1984); *Secrest Machine Corp. v. Superior Court*, 33 Cal.3d 664, 669, 190 Cal.Rptr. 175, 600 P.2d 399 (1983) (when nonresident's activities are extensive or wide-ranging, or substantial, continuous and systematic, there is a

constitutionally sufficient relationship to warrant jurisdiction for all causes of action asserted against him).

Through the wide sale of its publications in the State of California, defendant's forum-related activity reaches such extensive proportions "as to make the defendant sufficiently 'present' in the forum state to support jurisdiction over it . . ." *Tiffany Records, Inc. v. M.B. Krupp Distributors, Inc.*, 276 C.A.2d 610, 617, 81 Cal.Rptr. 320 (1969).

C. IF DEFENDANT'S CONTACTS ARE INSUFFICIENT TO SUSTAIN GENERAL JURISDICTION, THEY ARE CLEARLY SUFFICIENT TO ESTABLISH LIMITED JURISDICTION

Defendant has repeatedly argued that its Focus magazine is sold in California by independent distributors and therefore defendants should be permitted to avoid jurisdiction in this state. Petition at 4, 11, 15, 17, etc. All modern authority rejects this argument. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980), this Court made clear that "if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly the market for its product in other states, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury . . . " 100 S.Ct. at 567 (emphasis added).[13]

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[13] *See also Buckeye Boiler Co. v. Superior Court*, 71 Cal.2d 893, 80 Cal. Reptr. 113, 458 P.2d 57 (1969) ("A manufacturer's economic

Indeed, "[a] state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act done elsewhere with respect to causes of action arising from these effects . . ." *Sibley v. Superior Court,* 16 Cal.3d 442, 446, 546 P.2d 322, 324, 128 Cal. Rptr. 34, 36 (1976), *cert. den.* 429 U.S. 826 (1976).(emphasis added).[14]

The "effects test," which defendant chooses to ignore, was upheld by this Court in *Calder v. Jones*, 465 U.S. 781, 104 S.Ct. 1482 (1984), the most recent Supreme Court case dealing with "minimum contacts" in a libel action.

In *Calder* actress Shirley Jones, a professional entertainer, filed suit for libel and defamation against the National Enquirer, Iain Calder, editor of the magazine, John South, the reporter who wrote the article in question, and a California distributor.

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relationship with a state does not necessarily differ in substance, nor should its amenability to jurisdiction necessarily differ, depending on whether it deals directly or indirectly with residents of the state"). The indirect manner in which products might be distributed in the state "effect[s] little, if any, [question] of the jurisdictional situation." *Regie Nationale Des Usines Renault v. Superior Court,* 208 Cal.App.2d 702, 703, 25 Cal.Rptr. 530, 531.

[14] *See also Bartlett v. Superior Court,* 86 Cal.App.3d 72, 150 Cal. Rptr. 25 (1978) ("One of the recognized bases for jurisdiction in California arises when the defendant has caused an 'effect' in the State by an act or omission which occurs elsewhere"); *Seagate Technology v. AJ Kogyo Co. Ltd.*, 219 Cal.App.3d 703, 268 Cal.Rptr. 586, 589 (1990) ("where [foreign defendants] are alleged to have engaged in intentional tortious activity, directed at a California resident, jurisdiction over them is proper.")

Only Smith and Calder challenged the jurisdiction on the California courts, arguing they had no contacts in California. In granting the motion to quash, the Superior Court used language remarkably similar to that found in defendants' Petition, noting that neither Calder nor Smith "maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the article. Reporter Smith made a few telephone calls into California . . . The totality of such contacts, in this Court's view, are [sic] insubstantial." *See Jones v. Calder*, 187 Cal.Rptr. 825 (1982) (emphasis added).

However, the California Court of Appeals reversed, holding that jurisdiction was proper because the "effects" of defendants' libelous article were felt in California. *Id.* Calder and Smith appealed to this Court, which affirmed the California Court of Appeal's decision. This Court held:

> The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects . . . The Court of Appeals further suggested that petitioner's South's . . . numerous telephone calls to California, formed an independent basis for an assertion of jurisdiction over him in this action. In light of our approval of the "effects" test employed by the California court, we find it unnecessary to reach this alternative ground . . . [The] lack of "contacts" will not defeat otherwise proper jurisdiction. Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises .

> . . The alleged libelous story concerned California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The . . . brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California . . . Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California . . . An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California . . . .

104 S.Ct. at 1485-1487 (emphasis added).

Similarly in this case, (1) "[t]he fact that the actions causing the effects in California were performed outside the State [does] not prevent the State from asserting jurisdiction over a cause of action arising out of those effects," (2) "the plaintiff is the focus of the activities of the defendants out of which the suit arises," (3) "[t]he alleged libelous story concerned California activities of a California resident."[15] (4) the challenges article "impugned the professionalism" of the plaintiff whose work is "centered in California," and (5) the "brunt of the harm, in terms both of respondent's emotional distress and the injury to [his] professional reputation, was suffered in California." Under these circumstances, jurisdiction over petitioners is proper in California. As this Court has warned, under these

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[15] Defendants repeatedly argue that plaintiff is only a "temporary" resident of California. This is not true. See footnote 3 and accompanying text.

circumstances defendants must "reasonably anticipate being haled into court . . . to answer for the truth of the statements made in their article." *Calder v. Jones,* 104 S.Ct. at 1487.

The cases relied upon by defendants are out-dated and/or inapposite to the issue decided by the Superior Court. Defendants cite *Cornelison v. Chaney*, 16 Cal.3d 143 (1976), at length for the proposition that a defendant's actions in the forum state must be "wide ranging" for jurisdiction to attach. *Cornelison* is a pre-*Calder* case, and, in any event, involves products liability, not a libel.

As it did before the Superior Court, defendant also relies on *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship,* 146 Cal.App.3d 468, 194 Cal.Rptr. 240 (1983). Petition at 13. *Evangelize China Fellowship* is a pre-*Calder* case which is cited by defendants because it focused on the low "number" of issues of the allegedly libelous article circulated in the forum state. *Id.* at 444. However, both *Calder* and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (both decisions were issued on the same day) cast significant doubt on the continued vitality of earlier holdings that relatively small levels of circulation are insufficient minimum contacts to support jurisdiction. Defendant ignores this Court's holding that:

> [r]espondent's regular circulation of magazines in the forum state is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine.

Hustler Magazine, Inc., 104 S.Ct. at 1478. Jurisdiction was considered proper in New Hampshire, where neither plaintiff

nor defendant resided, "even though only a small portion of those [libelous] copies were distributed in New Hampshire." 104 S.Ct. at 1479 (emphasis added). Similarly, in *Calder*, defendants Calder and South, sued in their personal capacities, circulated no magazines in California at all -- they only worked for a company which did.

Finally, the Court may consider the interests of the plaintiff, defendants and the state in the assertion of jurisdiction in California. Here, in their own words, defendant is the "largest" publishing house in Japan. It obviously has vast resources compared with plaintiff and has retained one of the largest law firms in the country to represent it in these proceedings. Defendant has not argued that it is without the resources to litigate this case in California where the material for the article at issue originated, the subject of the article (the plaintiff) resides, the circumstances giving rise to the article (plaintiff's arrest by the INS) took place, the photograph published was taken and where the injury to plaintiff's reputation was felt.

On the other hand plaintiff is without the resources to litigate this case in Japan, and, in any event, could not presently travel to Japan without jeopardizing his resident status in the State of California. Plaintiff does not have the resources necessary to litigate this case in Japan, and plaintiff's witnesses regarding the injury to his reputation caused by defendant's libelous publication are all located in California.

Finally, "the state always has an interest in providing a forum for its residents." *Tiffany Records, Inc.v. M.B. Krupp*, 276 C.A.2d 610, 619, 81 Cal.Rptr. 320 (1969).[16]

In *Keeton* the Supreme Court recently stressed the interest of the state in providing a remedy for libelous publications by non-forum publishers:

> "A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it affords protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort." [Citation omitted] . . . False statements of fact harm both the subject of the falsehood and the readers of the statement. [The states] may rightly employ [their] libel laws to discourage the deception of [their]

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16 The state clearly has a strong interest in providing a forum to its residents who are libelled in publications made available to purchasers and readers in the state. *See* Restatement (2d) Conflict of Laws, quoted in the Judicial Council's Comments to Code of Civil procedure section 410.10, Comment a to section 37 ("A state has a natural interest in the effects of an act within its territory even though the act itself as done elsewhere"). *See also Kaiser Aetna v. Deal*, 86 Cal.App.3d 896, 901, 150 Cal.Rptr. 615 (1978) ("A state has a special interest in exercising jurisdiction over those who commit tortious acts within its territory. Therefore, it is reasonable that a state should exercise jurisdiction over those who commit or cause to be committed in the state what is claimed to be a tortious act").

> citizens. There is 'no constitutional value in false statements of fact.' [Citation omitted].

Keeton, 104 S.Ct. at 1479 (emphasis added).

CONCLUSION

The law does not and should not contemplate that foreign companies have a free hand to injure California residents through slanderous and libelous publications because their publications reach readers only through independent distributors. Were that the rule, foreign publications could promote their products over domestic publications through uninhibited public defamations and sensationalism without regard to the harmful consequences of their tortious conduct. As much as defendant may wish it were so, thankfully such is not the law in this country.

The Superior Court's order denying defendants' motion to quash service was clearly not an abuse of discretion. Defendant has now filed a verified answer and this case should proceed to trial.

Plaintiff respectfully requests that this Court deny defendant's petition.

Respectfully submitted,

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October 29, 1991

(3)

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No. 91-478

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

SHINCHOSHA COMPANY,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

and

SHIGETO SHIMIZU,
Respondents.

PETITIONER'S REPLY BRIEF SUPPORTING ITS PETITION FOR A WRIT OF CERTIORARI

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12

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
I.	
The Record From The Superior Court Provides The Required Basis For Deciding The Issues Raised By This Case	2
II.	
"Abuse of Discretion" Is Not The Proper Standard Of Review	5
III.	
The Question Of Whether Minimum Contacts Exist Must Be Resolved At The Outset Of The Litigation To Insure Due Process	6
IV	
Imputing The California Activities of Independent Distributors to Shinchosha Destroys Defendant's Ability To Predict Where It Will Be Sued	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

Page

Asahi Metal Industries v. Superior Court of California, Solano County, 480 U.S. 102 (1987) 1, 4, 6

Calder v. Jones, 465 U.S. 783 (1983) 4, 6

Hanson v. Denkla, 357 U.S. 220 (1958) 3

Keeton v. Hustler Magazine, 465 U.S. 770 (1984) .. 4, 5

World-Wide Volkswagen v. Woodson, 444 U.S. 296 (1980) 5, 6, 7

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INTRODUCTION

Without conceding the accuracy of any of the arguments made by respondent Shigeto Shimizu ("Mr. Shimizu") in his Opposition to the Petition for Certiorari, Petitioner Shinchosha Company ("Shinchosha") submits this Reply Brief in accordance with the limits imposed by Supreme Court Rule 15(6) and addresses only those arguments "first raised in the brief in opposition." We address especially the adequacy of the record below, the relevance to this case of *Asahi Metal Industries v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), the appropriate standard of

review, and the necessity of review at this stage in the litigation.

ARGUMENT

I.

The Record From The Superior Court Provides The Required Basis For Deciding The Issues Raised By This Case.

Mr. Shimizu's suggestion that review of the Superior Court's decision is not possible because "the facts are not fully developed" ignores the record below.[1]

Shinchosha has introduced uncontroverted evidence that (1) the sole authorized means by which *Focus* is distributed is through sixteen independent distribution companies (Declaration of Susumu Umeda, Deputy Director of Shinchosha's Business Department, attached to Shinchosha's Reply Brief Supporting Motion to Quash, ¶3), (2) that only three of those companies send any *Focus* magazines outside of Japan and that those three send no more than 40 of the 600,000 issues published per week of *Focus* magazine to California (*Id.*), and (3) that Shinchosha neither authorizes nor controls the distribution of any of its publications outside of Japan nor retains

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[1]Mr. Shimizu contends that Shinchosha's opposition to his Motion to Compel Responses to Discovery prevented full development of the facts in this case, yet when the Superior Court denied that motion, Mr. Shimizu failed to seek review of the decision. His time for questioning that denial passed long ago and his comments regarding what the record would contain if the motion had been granted are purely speculation. Moreover, Shinchosha fully answered interrogatories concerning its business activities in California, visits by its employees to California, and all persons with whom it had engaged in any business activities while those persons were in California.

any possessory or financial interest in any Shinchosha publication distributed abroad.[2]

In the only evidence proferred by Mr. Shimizu on this point that was accepted by the Superior Court, Mr. Shimizu has alleged that someone acting on his behalf saw 45 copies of *Focus* and an undetermined number of other Shinchosha publications in a bookstore in Los Angeles.[3] (Superior Court Minute Order Attached to Petition as Exhibit A).

The Superior Court explicitly found that "only a few copies of FOCUS magazines reach California." Moreover, the Superior Court did not find that Shinchosha had in any way "purposefully avail[ed] itself of the privilege of conducting activities in [California]," *Hanson v. Denkla*, 357 U.S. 220, 223 (1958), other than by placing its publication in Japan into a "stream of commerce" originating in Japan: "defendant does business in Califor-

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[2]There is no evidence in the record to support Mr. Shimizu's assertion that "Focus magazine is Japan's 'National Inquirer,' and admittedly distributed to and read by the Japanese community world-wide." (Respondent's Opposition at 6).

[3]The declarations on which Mr. Shimizu has relied, from Ms. Inoue and Mr. Rikimaru, are largely based on telephone conversations. The declarants visited only one bookstore each and then telephoned other bookstores. Ms. Inoue did not even provide information about her ability to read Japanese. Defendant made timely objections to these declarations on the grounds that they were hearsay and lacked foundation. The Superior Court expressly limited its consideration of those declarations to statements about what the declarants had personally seen. (Exhibit A to Petition at 1, ¶3). Mr. Shimizu objected to Mr. Umeda's declaration on the grounds of hearsay, yet the Superior Court made no ruling upholding the objection and the Court relied on that declaration as well as Shinchosha's Response to Request for Admission Number Six, which both stated that no more than 40 copies of *Focus* are distributed in California.

nia in a broad manner, to wit, as a publisher it sells its product (albeit through intermediate distributors) in the usual stream of business manifested by the product reaching the penultimate destination, the book store." (Exhibit A to Petition at 1a).[4]

The "stream of commerce" argument that the Superior Court relied on in reaching its conclusion was precisely the issue that *Asahi Metal Industries v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), left unresolved. Contrary to Mr. Shimizu's assertions, *Asahi* is quite relevant to the jurisdiction determination in this case, even though it involves products liability and not libel.[5] Moreover, because the defendant in *Asahi*, like the defendant in this case, was located in Japan and not merely in another state, it has particular relevance in this case. This critical fact also diminishes the relevance of *Calder v. Jones*, 465 U.S. 783 (1983), and *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), where the defendants were American publishers and editors, the allegedly defamatory publications were printed in English and were directed at a nationwide readership in the United States, and a "substantial number" of the publications were distributed in the forum state. *See Keeton*, 465 U.S. at 770-71, 780-81; *Calder*, 465 U.S. at 785.

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[4]Even assuming that there are 110 copies of *Focus* magazine present in California during any given week (as Mr. Shimizu asserts but not as the Superior Court found), or that there is some number of other Shinchosha publications present in California, there is no evidence to suggest that those additional copies of *Focus* or those other Shinchosha publications arrived in California either through some act of Shinchosha or through some act of the independent Japanese distributors who distribute Shinchosha publications.

[5]The distinction between jurisdiction cases that concern libel and those that concern products liability was rejected by this Court in *Calder v. Jones*, 465 U.S. 783, 790 (1983).

Because he ignores these differences, Mr. Shimizu never addresses the policy implications raised by a California court's assertion of jurisdiction over a Japanese defendant. He fails to consider the demands of international law and comity and treats this case as if it were simply a matter of "interstate federalism,"[6] in which there were no exceptional burdens imposed because of differences in language or culture, no effect on foreign trade or relations, and no problem regarding the enforceability of judgment if jurisdiction is found to be proper. These issues were what made *Asahi* worthy of this Court's attention and they are also what makes this case deserving of review.

II.

"Abuse of Discretion" Is Not The Proper Standard Of Review.

In those cases involving questions of personal jurisdiction over a defendant, this Court has always analyzed the lower court's decision for "error of law," and has never applied an "abuse of discretion" test. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773 (1983). Nevertheless, Mr. Shimizu introduces without citation the misleading notion that "abuse of discretion" is the correct standard for determining whether jurisdiction over Shinchosha meets the requirements of due process. This high level of deference finds no support in the case law and would be contrary to reason. The determination of whether jurisdiction over a particular defendant is proper implicates a Constitutional right that does not require deference to the discretion of a particular judge.

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[6] *World-Wide Volkswagen v. Woodson*, 444 U.S. 296, 293 (1980).

Mr. Shimizu's statement that the issue of jurisdiction over a nonresident is not a "federal issue" is equally without merit. A defendant's obligation to appear only before the court of a state where he has established "minimum contacts" is at the center of constitutional jurisprudence. Indeed, this Court's decisions to grant a writ of certiorari in both *Asahi* and *Calder*, which also questioned the constitutionality of a California court's jurisdiction over a nonresident, confirm that such issues are proper subjects for this Court's consideration.

III.

The Question Of Whether Minimum Contacts Exist Must Be Resolved At The Outset Of The Litigation To Insure Due Process.

To protect a defendant who lacks "minimum contacts" with the forum against having to defend himself in an improperly filed lawsuit, it is essential that courts resolve jurisdictional issues at the outset of a case. Mr. Shimizu argues that Shinchosha should be required to wait until there is a final judgment before it can seek review of this issue, yet such a requirement would subvert the very principles on which the concept of personal jurisdiction rests.

This Court stated in *World-Wide Volkswagen* that:

> The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

World-Wide Volkswagen, 444 U.S. at 292.

These two functions can only operate if the issue of jurisdiction is considered at the outset. Once the defendant has undergone the burden of defending himself through final judgment on the merits, the due process protection cannot be restored, and the state's overreaching cannot be corrected.

The burden imposed on a defendant by forcing him to come to a foreign jurisdiction to challenge jurisdiction is already quite significant. To add to that burden by requiring the defendant to wait until final judgment before seeking review would negate the protections intended by the "minimum contacts" test.

IV.

Imputing The California Activities of Independent Distributors to Shinchosha Destroys Defendant's Ability To Predict Where It Will Be Sued.

The "minimum contacts" test not only protects the defendant against shouldering the burden of a defense where jurisdiction is improper, it also lends a degree of predictability to litigation by "allow[ing] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Consequently, defendants can "act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *Id.*

Similarly, the requirement that the defendant must have "purposefully avail[ed]" himself of the forum promotes predictability in litigation because it is then rea-

sonable to assume that the defendant should have foreseen that a court in that state would assert jurisdiction. Here, there is no evidence that Shinchosha "purposefully avail[ed] itself of the privilege of conducting activities in [California]," and thus it was not foreseeable that a California court would subject it to jurisdiction: seventy-five percent of the allegedly defamatory statements in the article in question concerned the non-California activities of a Japanese citizen; the article was printed in a Japanese-language magazine which is directed at an exclusively Japanese readership; only three of the sixteen independent distribution companies that distribute the magazine send any issues outside of Japan; of those issues sent outside Japan only 40 copies arrive in California each week; and finally, Shinchosha retains no control over nor financial interest in any of its publications distributed abroad.

Imputing the California activities of independent distribution companies to Shinchosha under these circumstances is therefore inconsistent with the goal of predictability. For Shinchosha to be held subject to general or even limited jurisdiction in California, based on the activities of those distribution companies, represents a departure from the "purposeful availment" requirement and lends a haphazard quality to the assertion of personal jurisdiction over alien defendants.

CONCLUSION

For the foregoing reasons and those stated in our Petition for Certiorari, we respectfully submit that the Court should grant a Writ of Certiorari to review the decision of the California Court of Appeal.

Respectfully Submitted,

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